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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 209

UNION PETROLEUM CORP., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. B) is reported at 376 ~~U.S.~~ 569. (F. 2d

JURISDICTION

The judgment of the court of appeals was entered on April 10, 1967. A petition for rehearing was denied on May 1, 1967. The petition for a writ of certi-

orari was filed on May 31, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the evidence was sufficient to sustain petitioner's conviction.

STATUTE INVOLVED

49 U.S.C. 41(1) provides in pertinent part:

> [I]t shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept, or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to [the Interstate Commerce Act] * * * whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier as is required by said Act * * *, or whereby any other advantage is given or discrimination is practiced. Every person or corporation, whether carrier or shipper, who shall, knowingly, offer, grant, or give, or solicit, accept, or receive any such revates, concession, or discrimination shall be deemed guilty of a misdemeanor * * *.

STATEMENT

Petitioner, a corporation, after waiving a trial by jury, was convicted in the United States District Court for the Eastern District of Oklahoma under a twenty-six count information charging that petitioner

knowingly solicited and received railroad rate concessions on shipments of propane gas by falsely representing to the carrier that the shipments were accorded storage-in-transit service and were thus entitled to a rate of approximately one-fifth the usual rate between the shipping point and the destination point, in violation of the Elkins Act, 49 U.S.C. 41(1) (R. 1-17).[1] On September 10, 1965, petitioner was fined $1,000 on each count, the minimum fine possible under the Act (R. 18, 167-168). The court of appeals affirmed.

Petitioner is an Oklahoma corporation engaged in the distribution and sale of liquefied petroleum gas. In early 1962, petitioner arranged to buy gas in Texas and sell it in Sunray, Oklahoma, and to buy different gas in Sunray, Oklahoma, and sell it in Missouri. Petitioner was aware that a special "transit privilege" could be obtained by a distributing company which shipped gas to a storage facility, unloaded and stored it, and subsequently reloaded it and shipped it on to a second destination. Under the transit privilege a distributor would be permitted (for a small additional charge) to reship the gas from the storage facility[2] to the second destination

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[1] "R." refers to the printed record in the court below. "S." refers to the stipulation between the parties which was filed in the court of appeals on October 20, 1966.

[2] Since any specific liquefied petroleum gas is a fungible commodity and since it is impractible to avoid the commingling, in the shipper's storage facilities, of gas obtained from various sources, the regulations permit shipping out at transit rates of the same quantity of stored gas as was shipped in,

at a rate substantially less than the usual charge for shipments between those two points—a rate equal to the through rate from the point of origin to the second destination less the amount already paid for shipment between the point of origin and the storage facility (S. 1-3).

On February 9, 1962, petitioner applied to a railroad representative for transit privileges at Sunray, Oklahoma (Def. Exh. 2; R. 85-86). That representative acknowledged receipt of the "application for storage-in-transit privileges on liquefied petroleum gas stored in your facilities at Sunray, Oklahoma" (Def. Exh. 3; R. 86), and sent petitioner a form for completion and execution. Petitioner completed the form, representing the purpose of its transfer operation as "Storage" [*] and the storage capacity of the facility as 4,556,128 gallons (Def. Exh. 4; R. 86). Petitioner in fact had no storage facilities at Sunray at the time of the application, nor were any thereafter acquired (R. 98; S. 2).

Subsequently, on numerous occasions in 1962 and 1963, petitioner purchased isobutane gas from suppliers in Texas, shipped it in railroad tank cars to Sunray, Oklahoma, and, pursuant to contract, sold it to the Sunray D-X Oil Company which used it in the

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whether or not its separate identity has been maintained (R. 134-135; see Pet. App. D, at p. 256, item 2652, part 2(c)).

[*] In addition to simply storing the gas, a shipper is permitted to submit it to such processes as blending, purifying, dehydrating, etc., either prior or subsequent to placing it in storage (see Pet. App. D, at p. 255, item 2648(d); Def. Exh. 4).

production of high octane gasoline. None of the gas was stored by or for petitioner. Petitioner in turn purchased locally-produced propane gas from Sunray D-X, shipped it in railroad tank cars to Versailles or Boonville, Missouri, and there sold it to the Gygr Gas Company. In making the latter shipment, petitioner, under its approved application for transit privileges, claimed and was granted the lower transit rate as though it were simply shipping on to Missouri gas which it had earlier shipped in from Texas and placed in storage[4] (R. 65, 67, 72-73; S. 1-3).

At the end of 1962, the railroad representative required that, pursuant to the tariff regulations (see Pet. App. D, at p. 256, item 2652 n. 2), each shipper afforded transit privileges submit a report as to the quantity of gas stored at its transit point which was subject to being reshipped at the special transit rates. Petitioner responded by forwarding a report, in affi-

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[4] Under the applicable tariff which was published and filed with the Interstate Commerce Commission and of which petitioner had full knowledge, the shipment rate per hundred pounds of liquefied petroleum gas from Sunray, Oklahoma, to the Missouri destination was 51.5 cents. However, for liquefied petroleum gas previously shipped from the Texas points, which are here involved, to a storage facility in Sunray, Oklahoma, the transit rate from Sunray to Versailles or Boonville, Missouri, would total only 8.5 cents or 9.5 cents, respectively, instead of the usual rate of 51.5 cents. While petitioner paid the railroad the lower rate, upon selling the propane to Gygr, petitioner charged Gygr for transportation on the basis of the usual, higher rate. Since petitioner sold the propane to Gygr at a lower base price than it had paid Sunray D-X, petitioner's entire profit on the venture was attributable to the difference between the usual shipping rate and the transit rate (S. 1-4).

davit form, which represented that it had on hand 1,260,000 gallons of liquefied petroleum gas at Sunray, Oklahoma (Gov't Exh. 70; R. 102-103). Petitioner did not in fact have any gas stored at Sunray (S. 2).

ARGUMENT

Petitioner argues that a lack of *mens rea*, and an honest but mistaken belief in the applicability of the lower of two tariff rates, should preclude a conviction for receiving an unlawful railroad rate concession under the Elkins Act. Whatever the validity of this contention in the abstract, it bears no relation to the facts of this case. Here petitioner was charged with knowingly soliciting, receiving and accepting rate concessions "by the device of falsely representing to the * * * Railroad Company that [each] * * * shipment was accorded storage-in-transit service, and was entitled to the transit rate * * *" (R. 1-17). Petitioner admitted at trial that claiming a transit rate under the operation it was conducting violated the historical concept of the transit privilege (R. 25), but defended its acts on the ground that, under the particular wording of the tariff regulation dealing with commingled transit and non-transit gas (see note 2, *supra*), there was nothing to prohibit petitioner's shipping from Sunray at the transit rate a different gas of the same quantity as that which it had shipped in (R. 25-26).[5] The wording of the regu-

[5] Petitioner asserts (Pet. 5-6) that three "disinterested expert witnesses" testified at trial that this was their interpretation of the regulation. One of these witnesses was petition-

lation, however, dealt only with gas in "storage" at the "shipper's facilities" (Pet. App. D, at p. 256, item 2652, part 2(c); see *id.*, at p. 50, item 2642-D), and petitioner, so the trial court found (R. 17; see also Pet. App. 4a), had no storage facilities whatsoever in Sunray.[6] When petitioner's counsel argued at one point during the trial that petitioner "at all times acted in good faith" (R. 154), the court in response referred to petitioner's affidavit of December 31, 1962, swearing that "they have so much storage" (*ibid.*); on another occasion the court noted that the evidence revealed that petitioner "had no storage at all" and had engaged in a "subterfuge trying to bring storage where there was none" (R. 143). The evidence plainly revealed that petitioner falsely represented to the railroad that it had at Sunray large storage facilities where transit gas was being stored, and that it was on the basis of this affirmative misrepresentation of fact that petitioner had claimed, and had been given, the lower transit rate. Absence of any innocent intent and honest mistake was therefore charged, established, and found.

In any event, guilty intent is not an essential element of a prosecution under 49 U.S.C. 41(1) for soliciting and receiving a concession to

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er's own vice president in charge of traffic (R. 84); the other two were officers in similar capacities at other oil distributing companies (R. 122, 128).

[6] As noted by the court of appeals, the provision relied upon by petitioner "would seem to comprehend a different situation entirely" (Pet. App. 7a), and not one involving "a complete substitution of basically dissimilar products" (Pet. App. 9a).

transport goods at less than the published tariff rate. In construing this statute in *Armour Packing Co.* v. *United States*, 209 U.S. 56, this Court noted (209 U.S. at 85-86):

> * * * While intent is in a certain sense essential to the commission of a crime, and in some classes of cases it is necessary to show moral turpitude in order to make out a crime, there is a class of cases within which we think the one under consideration falls, where purposely doing a thing prohibited by statute may amount to an offense, although the act does not involve turpitude or moral wrong. In this case the statutes provide it shall be penal to receive transportation of goods at less than the published rate. * * * The stipulated facts show that the shippers had knowledge of the rates published and shipped the goods under a contention of their legal right to do so. This was all the knowledge or guilty intent that the act required. * * *

Left open by *Armour* was the question "[w]hether shippers who pay a rate under the honest belief that it is the lawfully established rate, when in fact it is not, are liable under the statute because of a duty resting on them to inform themselves as to the existence of the elements essential to establish a rate as required by law" (209 U.S. at 85-86). That question was answered in *Lehigh Coal & Nav. Co.* v. *United States*, 250 U.S. 556, a decision which, contrary to petitioner's contention (Pet. 6-11), did not affect the *Armour* holding. There the applicable tariff provision had been filed with and approved by the ICC, and the

defendant acted in reliance upon the validity of the tariff thus published. This Court found the tariff provision invalid, but held that a shipper's compliance with the published and apparently valid tariff provision did not constitute an offense under 49 U.S.C. 41(1). *Armour* was specifically distinguished on the ground that it had involved an omission to comply with the published tariff, an omission which the defendant attempted to justify by honesty of motive or purpose (250 U.S. at 564-565). Here, as in *Armour*, there was an omission to comply with the applicable, published tariff, and an attempted justification. This knowing omission itself is the basis of the offense under the statute. The word "knowingly," which was inserted in the statute between the dates of the *Armour* and *Lehigh* decisions, refers only to a perception of the facts which bring the activity within the prohibition of the statute, not to an awareness that the activity is in fact prohibited.[7] Here, as pointed out by the court below, petitioner "had full knowledge of the tariffs as well as all facts which would render the transit privilege inapplicable and discriminatory herein" (Pet. App. 11a; see S. 4). As stated by this Court in *Sinclair* v. *United States*, 279 U.S. 263, 299 (citing *Armour* v. *United States*, *supra*), a "mistaken view of the law is no defense."

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[7] Similarly, the decision of the Seventh Circuit in *Standard Oil Co. of Indiana* v. *United States*, 164 Fed. 376 (C.A. 7), certiorari denied, 212 U.S. 579, cited by petitioner as in conflict with the decision below (Pet. 5, 9), is, like *Lehigh*, plainly distinguishable from the factual situation here involved.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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